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No. 95-992

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF BROADCASTERS AND ASSOCIATION OF LOCAL TELEVISION STATIONS

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BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF BROADCASTERS AND ASSOCIATION OF LOCAL TELEVISION STATIONS

Appellees National Association of Broadcasters (NAB), and the Association of Local Television Stations, Inc. (ALTV),[1] request affirmance of the judgment of the three-judge district court upholding the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534, 535 ("the Act").

STATEMENT

Appellees NAB and ALTV adopt the statement of the federal appellees.

[1] ALTV was formerly known as the Association of Independent Television Stations, Inc. (INTV).

SUMMARY OF ARGUMENT

The must-carry provisions of the Act require cable operators to set aside a limited portion of their channel capacity to ensure access for local television broadcasters. In affirming that these provisions were content-neutral laws subject to only intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), this Court held that "Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2461 (1994) ("*Turner I*"). As the Court held, Congress imposed these requirements based on its assessment that cable had achieved bottleneck control over video programming access to most American households, and was likely to exploit that control in ways inimical to broadcasters, who depended on cable for access to most of their potential viewers. *Id.* at 2454-55, 2466. Without must-carry, Congress concluded, significant numbers of stations would likely be denied carriage, Act at §2(a)(15), and stations so affected would likely deteriorate or fail, to the substantial detriment of the over 90 million Americans who depend on free over-the-air broadcasting.

The Court remanded for the limited purposes of determining whether Congress' predictive judgments were based on reasonable inferences drawn from substantial evidence, and assessing whether in actual operation must-carry was narrowly tailored. The Court made clear that review on remand was to be deferential. The district court was *not* to reweigh the evidence *de novo* or replace congressional predictions with judicial ones. *Turner I*, 114 S. Ct. at 2471. The district court faithfully followed this Court's remand instructions, determined there was "substantial evidence" supporting Congress' "predictive judgments" regarding the need for must-carry, and found the "actual

effect" of must-carry on the cable industry was so *de minimis* that "if the burden to the cable industry was much smaller, then the First Amendment would not even be implicated." Jurisdictional Statement Appendix 7a, 13a n. 22, and 22a (December 21, 1995 ("J.S. App.")).

The evidence on these points is not only substantial, but overwhelming. The record in the district court included:

- More than 30,000 pages of the record before Congress, which showed Congress' careful examination of the cable and broadcast industries, and contained ample evidence supporting Congress' conclusions;
- The testimony of distinguished economists and experts, who supported Congress' factual conclusions and concluded that Congress' judgments and predictions were entirely reasonable; and
- Testimony and documents from the cable and broadcasting industries that supplemented the Congressional record and demonstrated the complete lack of any significant harm to cable systems and programmers from must-carry.

The Harm to Broadcasting. Because any significant decrease in, or harm to, existing broadcast sources would threaten Congress' "overriding" objective, this Court asked whether there was substantial evidence supporting Congress' predictive judgments that significant numbers of stations would be denied carriage absent must-carry, and that broadcasters so affected would suffer financial difficulties as a result. The district court correctly concluded that the answer to these questions was yes. Even *cable*'s expert concluded that by 1992, cable operators were already refusing to carry 19-31% of *all* broadcast stations, including network affiliates, and were refusing to carry 39% of all UHF independents. Moreover, Congress found, and the evidence on remand confirmed, that the cable industry had *increasing* incentives to deny carriage

to broadcast stations. And there is no serious dispute that stations denied carriage suffer financial difficulties. Indeed, cable industry documents candidly acknowledge that cable carriage is crucial to the viability of broadcast stations.

Appellants and the dissent below contend that this massive record can be read differently to support their argument that must-carry was unnecessary. That evidence about complex and rapidly evolving industries is subject to differing interpretations is not surprising, but for purposes of this case, is irrelevant. As the court below correctly observed (J.S. App. 6a), even if appellants' interpretation of the record were the better one (and most emphatically it is not), the question is not whether Congress was right or wrong, but whether its judgment was supported by "substantial" evidence and whether it made "reasonable" predictions based on that evidence. Any more searching inquiry would violate this Court's remand instructions and would substitute judicial judgments for Congress' economic and social policy judgments.

Appellants argue that cable operators would voluntarily carry perhaps 70% of the existing broadcast stations, including the popular, "mainstream" broadcast stations that attract the great majority of viewers. That argument is factually wrong, but the more important point is that it is *irrelevant* once the federal interest in maintaining broadcast diversity is squarely acknowledged. Plainly, a significant reduction in the number of broadcast sources available to noncable homes would threaten the federal interest in ensuring that noncable homes have access to a "multiplicity" of "diverse" broadcast sources, even if the broadcast industry, as a whole, would survive.

Actual Effects. This Court also asked the lower court to determine the "actual effects" of must-carry on cable operators and programmers. Although appellants in *Turner I* made extravagant claims that must-carry in fact occupied 30-40% of cable channel capacity (claims on which the dissenting Justices relied), only 7.19% of

cable capacity was used for must-carry, and only 1.18% was used to add stations cable systems were not already carrying. Moreover, because cable systems were able to use previously unused capacity to add those stations, only 5.5% of the nation's cable systems had to drop even a single programmer for any period of time. Nationwide, cable systems were able to continue carrying *99.8%* of the programming they were carrying before must-carry was enacted. Cable programmers likewise have faced minimal burdens. The appellant programmers each *alleged* injury on less than 1% of the nation's cable systems as a result of must-carry. All of the appellant cable programmers substantially increased their subscribership since enactment of must-carry. Even these *de minimis* effects are rapidly vanishing as cable channel capacity continues to increase. Every six months, aggregate cable capacity increases by an amount greater than the *total* capacity presently used for must-carry stations. Plainly, these isolated and *de minimis* effects are insufficient to sustain appellants' nationwide *facial* challenge.

Furthermore, the regulatory alternatives appellants propose would not maintain a multiplicity of broadcast sources nearly as effectively as the means Congress chose. Thus, they provide no basis for invalidating must-carry under *O'Brien*. Leased access, in particular, is not a viable alternative. Requiring broadcasters to pay for access would affirmatively obstruct Congress' "overriding" objective of preserving a multiplicity of diverse broadcast programming. Indeed, Congress considered and *rejected* the option that broadcasters pay for access, and did so precisely for this reason.

Accordingly, the judgment below should be affirmed.

ARGUMENT

I. THE QUESTION IN THIS APPEAL IS A NARROW ONE: WHETHER MUST-CARRY REASONABLY FURTHERS THE CONTENT-NEUTRAL GOAL OF PRESERVING THE EXISTING STRUCTURE OF BROADCASTING.

At the outset, it is important to make clear what is and is not at issue in this appeal. All that remains at issue is whether must-carry is a reasonably tailored means to achieve a goal this Court already determined to be both substantial and content-neutral: "preserv[ing] the existing structure of the Nation's broadcast television medium." *Turner I*, 114 S. Ct. at 2464. This Court already held that this goal is "unrelated to the content of speech" because Congress aimed at "preserv[ing] access to free television programming for the 40 percent of American households without cable," irrespective of the content of that programming. *Id.* at 2461. This Court also held that Congress' interest in preserving the broadcast structure for noncable households is "not only a permissible governmental justification, but an important and substantial federal interest." *Id.* at 2461 (quotation omitted). Accordingly, it is settled that "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." *Id.* at 2469.[2]

Despite these clear holdings, appellants seek to relitigate the applicable standard of scrutiny and to rewrite Congress' goals in enacting must-carry. Employing the entirely inapposite language of strict scrutiny, appellant NCTA argues that must-carry is "not *necessary* to assure

[2] Appellants repeatedly refer to the opinion in *Turner I* as a plurality. That is true only with respect to parts II.A, II.B, and III.B. Five Justices joined the remaining parts, including each of the holdings quoted in the text of this paragraph. And Justice Stevens would have gone further, and upheld must-carry on the basis of the record then before the Court.

the economic viability of the broadcast system as a whole," nor "*necessary* to protect against widespread anticompetitive actions against local broadcast stations." NCTA Br. at 18, 24 (emphasis added). Such arguments are irrelevant to the application of the *O'Brien* standard that governs this case.

Likewise, appellant NCTA asserts that must-carry's "discriminat[ion] in favor of local broadcast stations at the expense of cable programmers is presumptively unconstitutional." NCTA Br. at 15 (emphasis added). But the Court already flatly rejected this assertion when it was couched as a direct plea for strict scrutiny. *Turner I*, 114 S. Ct. at 2460, 2461 (must-carry distinguishes between cable and broadcast speakers based "upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry"; "speaker distinctions of this nature are *not* presumed invalid under the First Amendment") (emphasis added). As the Court held in *Leathers v. Medlock*, "a differential burden on speakers is insufficient by itself to raise First Amendment concerns." 499 U.S. 439, 452 (1991). Must-carry does not seek to enhance the persuasive power of broadcasters or diminish that of cable programmers.[3] It regulates technological and economic relationships that have nothing to do with the content of speech.

For these reasons, appellants' barely concealed efforts to substitute full-bore strict scrutiny for this Court's clear instructions in *Turner I* are unavailing. The issue is *not*

[3] Thus, appellants can find no support in the First Amendment principle that government may not "restrict[] the voice of some elements of our society in order to enhance the relative speech of others." (NCTA Br. at 15 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976))). As this Court held, "*Buckley* does not support appellants' broad assertion . . . . Rather, it stands for the proposition that speaker-based laws demand strict scrutiny when they reflect the Government's preference for the *substance* of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner I*, 114 S. Ct. at 2467 (emphasis added).

whether Congress' content-neutral economic and social policy choices can survive the meticulous dissection appropriate to a doctoral dissertation in economics. Such scrutiny would smack of long-discredited substantive due process review, and would risk substituting judges' views about wise policy for those of Congress. It would also make First Amendment review of content-neutral laws completely impractical and unmanageable. Rather, as this Court held in *Turner I*, the issue is simply whether "Congress has drawn *reasonable* inferences based on *substantial* evidence" in concluding that must-carry furthers the substantial and content-neutral goal of preserving the structure of the broadcasting system. 114 S. Ct. at 2471 (emphasis added). This standard "is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions." *Id.*

Appellants also seek to redefine the government interest underlying must-carry. This Court held that "Congress' overriding objective" was "maintaining the local broadcasting structure" in order to preserve the level of broadcasting diversity established through the "system of allocation" created by Section 307(b) of the Communications Act of 1934. *Turner I*, 114 S. Ct. at 2461, 2469. That "system of allocation," Congress noted, was designed to provide a "fair, efficient and equitable" distribution of broadcast services, and, as the Court recognized, must-carry was enacted in order to "maintain[]" it. Act, § 2(a)(9); 114 S. Ct. at 2469. By "preserv[ing] the existing structure of the Nation's broadcast television medium," Congress sought to ensure that the 90 million Americans without cable would continue to have access to "a multiplicity of information sources." *Id.* at 2464, 2470. The point of must-carry, therefore, is to prevent any material erosion of the multiplicity of broadcast programming sources available to noncable households.

Rather than confront this government interest directly, appellants (following the lead of the dissent below) seek to set up straw interests they find easier to challenge.

First, they suggest that must-carry is justifiable only if the entire broadcast television industry would have collapsed without it. To the extent this is an argument that Congress would not have acted to prevent any lesser threat than the collapse of broadcasting, the argument is simply wrong. Along with must-carry Congress enacted a "retransmission consent" provision, which allows broadcasters to forego mandatory access in exchange for the right to compensation for their signals. *See* 47 U.S.C. § 325(b). Because only broadcasters confident of cable carriage will opt for retransmission consent, and because Congress expected many broadcasters to pursue this option, it cannot be that Congress expected the entire broadcast industry to collapse without must-carry. Congress obviously knew that many broadcasters would survive without must-carry, but enacted must-carry to protect the many who might not.

Appellants do ultimately acknowledge that Congress "justified must-carry as vital to the preservation of the allocation system created by Congress and administered by the FCC for the benefit of non-cable viewers." TW Br. at 28. They argue, however, that the system of allocation seeks to protect only "access to a *minimum* amount of television broadcast services," and cable operators would carry that amount voluntarily. TW Br. at 28 (emphasis in original). That argument misapprehends a half-century of national communications policy. The system of allocation, created in the 1927 Radio Act, continued in the Communications Act of 1934, and embodied since 1952 in the FCC's Table of Allotments, seeks to ensure that every community has at least one broadcast *outlet* for local programming, *and* that every community *receives* as many diverse programming sources as the broadcast spectrum will permit and economic conditions will sustain.[4]

[4] The FCC's Table of Allotments assigns television frequencies to communities throughout the country. *See* 47 C.F.R. § 73.606. The FCC chose to establish a nationwide table, rather than grant licenses on an *ad hoc* basis, because a table would permit the num-

See Logansport Broadcasting Corp. v. United States, 210 F.2d 24, 26 (D.C. Cir. 1954) (system of allocation seeks "to achieve maximum television coverage with a minimum of interference between stations").[5] Thus, Congress' goal of preserving the "system of allocation" manifestly is not a goal of preserving only a "minimum" of over-the-air broadcast stations.

To the extent appellants and the dissent are arguing that the only concern *substantial* enough to justify must-carry would be a threat to the broadcast industry as a whole (*see* J.S. App. 71a), the argument is foreclosed by this Court's prior opinion. Must-carry seeks to ensure that noncable households will continue to have access to diverse broadcast sources. This is plainly a substantial interest in its own right, even if broadcasting would not collapse absent must-carry. This Court held it is an interest "of the highest order," for "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse

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ber of broadcast stations to "more closely approximate the mathematical optimum," accounting for interference and other factors. *See* Sixth Report & Order, *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 F.C.C. 148, at ¶ 14 (1952). Since 1952, there has been only a small increase in the number of broadcast allotments in the table; instead, as populations have increased and communities have grown so they can support additional broadcast stations, new stations have been licensed to use the frequencies previously set aside for those communities.

[5] *See also In re Clear Channel Broadcasting in the AM Broadcast Band*, 78 F.C.C.2d 1345, 1349 (1980) ("Since 1927, . . . three basic goals have been . . . at least one service to everyone; service to as many persons from as many diversified sources as possible; outlets for local self-expression addressed to each community's needs and interests. The Commission and the Courts have long recognized that all three of these goals are comprehended within the intent of § 307(b) of the Communications Act."). *See generally United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972) (plurality opinion); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981); *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943).

and antagonistic sources is essential to the welfare of the public." 114 S. Ct. at 2470 (quotations omitted) ("[p]rotecting noncable households from loss of regular television broadcasting service due to competition from cable systems is an important federal interest.") (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)). Moreover, it would greatly exceed this Court's proper role to second-guess Congress' judgment about how much free local broadcast television should be preserved for noncable households. Under *O'Brien*, the validity of a law "does not turn on a judge's agreement with the responsible decisionmaker concerning the . . . degree to which the [government's] interests should be promoted." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989); *United States v. Albertini*, 472 U.S. 675, 689 (1985).

Second, appellants (again tracking the dissent) alternatively posit the straw argument that Congress' overriding objective was a mini-Sherman Antitrust Act for the cable industry. They then argue at length that cable's conduct toward broadcasters is not predatory in the Sherman Act sense, and that Congress misjudged cable's economic incentives. Again, this extended foray is simply beside the point. Even if appellants were correct that cable carriage decisions have not generally risen to the level of Sherman Act violations, *O'Brien* surely does not justify judicial second-guessing of Congress' judgment about what economic behavior to categorize as anticompetitive. The First Amendment does not limit Congress to Sherman Act standards of allocative efficiency when it regulates marketplace activity.

Furthermore, this is not and has never been merely an antitrust case. The Communications Act of 1934 did not provide only for allocative efficiency in broadcasting; to the contrary, it seeks a "*fair*, efficient *and equitable* distribution of broadcast services," as Congress expressly noted in the 1992 Act. § 2(a)(9) (emphasis added).

The *equitable distribution* of broadcast services has always been at the heart of federal communications policy. Congress' overriding concern in enacting must-carry was a threat to *"the allocation system . . .* established by Congress and the FCC." H.R. Rep. No. 628, 102d Cong., 2nd Sess. 52 (June 29, 1992); CR VOL. I.A., Exh. 4, CR 00431 (emphasis added). Congress sought not only to ensure broadcasters a fair opportunity to compete for cable viewers, but, more importantly, to "ensur[e] that [the] local broadcast system will continue to thrive and that a broad array of views and programs from diverse, competitive and antagonistic sources is available to all television households, whether or not they subscribe to cable service." *Id.* at 67. That interest is threatened whether or not cable's noncarriage of local broadcasters would violate the Sherman Act. Even if a cable operator's decision to carry a cable programmer rather than a broadcaster could be said to promote allocative efficiency in the market for video information as a whole, Congress was still entitled to conclude that such decisions impaired the "fair" and "equitable" distribution of broadcasting to the 40% of (generally less affluent) noncable households who depend on free television.

Once appellants' diversionary tactics and the dissent's elaborate excursion into inapposite antitrust economics are properly put to one side, the critical issue in this case and the facts that bear on its resolution are remarkably simple: Did Congress draw reasonable inferences, supported by substantial evidence, that must-carry would directly advance its goal of preserving the broadcast allocation system? The record elaborated on remand—consisting of the voluminous evidence before Congress (which alone is sufficient), substantial additional testimony by distinguished experts, and other evidence—makes clear that the district court properly answered this question yes.

II. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE SUPPORTING CONGRESS' REASONABLE JUDGMENT THAT MUST-CARRY WAS NEEDED TO MAINTAIN THE MULTIPLICITY OF BROADCAST PROGRAMMING SOURCES FOR NONCABLE HOUSEHOLDS.

There is no dispute that cable operators exercise bottleneck "control over most (if not all) of the television programming that is channeled into the subscriber's home. . . . A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch." *Turner I*, 114 S. Ct. at 2466-67. *See also Hurley v. Irish-American Gay Group of Boston*, 115 S. Ct. 2338, 2349 (1995).

Because cable now serves at least 60 percent of American households, cable operators indisputably have the power to deny local television broadcasters access to most of their potential audience. Similarly, it is beyond dispute that must-carry would constitute an effective response to cable's exploitation of that power against broadcasters, for it addresses the problem at its source. The remaining question, therefore, is limited to whether Congress reasonably inferred that cable operators would exploit their bottleneck control with sufficient frequency to threaten the existing multiplicity of broadcast sources achieved through the "system of allocation."

Congress' conclusion that there was such a threat rests on economic policy judgments and empirical assessments that warrant substantial deference. As the Court recognized, Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Turner I*, 114 S. Ct. at 2471 (quotations omitted); *accord Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); *see also Lopez v. United States*, 115 S. Ct. 1624, 1628 (1995) (Breyer, J., dissenting). Deference is particularly warranted because Congress was making *predictive* judgments regarding the

complex relationships between rapidly changing industries. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03 (1973). Thus, this Court need only satisfy itself that "Congress has drawn reasonable inferences based on substantial evidence." *Turner I*, 114 S. Ct. at 2471. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). So long as that standard is satisfied, summary judgment is appropriate whether or not the evidence is in conflict or experts disagree.

To test the reasonableness of Congress' judgments, the Court directed deferential inquiry into the following questions (114 S. Ct. at 2469, 2471):

- whether absent must-carry "significant numbers of broadcast stations will be refused carriage on cable systems"
- whether "broadcasters so affected would suffer financial difficulties as a result," or "would be at serious risk of financial difficulty," or would "either deteriorate to a substantial degree or fail altogether"

As will be shown, the district court correctly held there was substantial evidence supporting Congress' judgments on these questions. Appellants are thus forced to take issue with the Court's prior conclusion that evidence of "significant numbers" of carriage refusals would adequately support Congress' decision to impose must-carry. First, they argue that the overall health of broadcasting from 1985 through 1991, when no must-carry requirements were in effect, precludes any inference that must-carry was needed to sustain the broadcast system "as a whole." Second, they argue that it does not matter whether "significant numbers" of stations would be denied carriage, because the stations denied carriage are not "significant stations."

In making these arguments, appellants frankly invite this Court to reweigh the evidence, to substitute judicial predictions for those made by Congress. and to make substantive policy choices about how much and what kind of broadcast programming noncable households should receive—in short, to engage in precisely the kind of *Lochner*-style review this Court previously disavowed in *Turner I*.

We will first address the specific questions posed by the Court. We will then show that appellants' reformulations of the issues are unavailing.[6]

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[6] It is not possible to address every factual argument in appellants' almost two hundred pages of briefs. Those arguments are addressed in much greater detail in NAB/INTV's Memorandum in Support of Motion for Summary Judgment (May 26, 1995) ("NAB Mem."); NAB/INTV's Opposition to Plaintiffs' Motions for Summary Judgment (June 16, 1995) ("NAB Opp."); and NAB's Reply Brief in Support of Motions for Summary Judgment (June 30, 1995) ("NAB Reply").

The evidentiary record consists of the congressional record and the additional evidence developed on remand. Abridged materials from the congressional record are contained in the two-volume "Joint Statement of Evidence Before Congress" (May 26, 1995) ("JSCR") (J.A. III at 1249), and includes congressional materials and closely related FCC proceedings that are cited in House and Senate reports. *See* JSCR ¶¶ 906-916. J.A. IV at 1700-03. The full 33 volumes of relevant congressional materials are designated as "Defendants' Joint Submission of Congressional Record in Support of Motion for Summary Judgment," Volumes I.A-I.GG (*e.g.*, volume 1.A, page 1 is cited as CR VOL. I.A, CR 00001). The additional evidence developed on remand includes expert submissions; sworn declarations and testimony by fact witnesses; and hundreds of thousands of documents obtained through discovery. Relevant materials are filed in 43 volumes designated as Defendants' Additional Evidence ("DAE") Volumes II.A through X (*e.g.*, Volume II.A, Exhibit 1, page 1 is cited as "DAE VOL. II.A, Exh. 1 at 1").

A. By 1992, There Was a Substantial Basis For Congress to Predict That "Significant Numbers of Broadcast Stations" Would Be "Refused Carriage On Cable Systems."

1. *Significant Numbers of Broadcasters Were Already Being Denied Carriage On Cable Systems.*

That "significant numbers of broadcast stations [would be] refused carriage on cable systems," *Turner I*, 114 S. Ct. at 2471, was already clear in 1992. This conclusion is supported by voluminous evidence before Congress[7] (which should end the inquiry[8]), and is confirmed by the findings of experts for both sides.

Cable's own expert, Dr. Stanley Besen, estimated that 19 to 31% of *all* local broadcast stations (including network affiliates) were not carried by the typical cable system in 1992.[9] Besen also reported that in 1992 the average cable system was carrying only 61% of local UHF independents and 78% of local public television stations.[10]

Appellees' expert, Dr. Jeffrey Rohlfs, reanalyzed the same data using the definition of the relevant television market used by both Congress and the FCC.[11] After

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[7] *See* JSCR ¶¶ 157-534, J.A. III at 1314-1523; NAB Mem. at 41-54, 82-89; NAB Opp. at 27-35; NAB Reply at 24-32.

[8] *See* Public Television Br. at Point I.

[9] *See* Besen Decl. Exhs. C-2 & C-3, J.A. II at 907-08. The range —19 to 31%—was derived using different definitions of "local" and different methods of averaging. Memorandum of NCTA, Inc. in Response to Defendants' Motion for Summary Judgment at 24 n.4 (June 16, 1993). The noncarriage percentage would have been even higher if Besen had used *Congress'* definition of the "local" television market.

[10] DAE VOL. VIII, Exh. E, Besen Decl. at 44, J.A. II at 943-47.

[11] *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 66 (1992), CR VOL. I.AA, Exh. 4, CR 00445; JSCR ¶¶ 775-781, J.A. IV at 1638-44;

correcting for errors, Rohlfs found that Besen's data indicates that by 1992 the typical independent station was being denied access to *47%* of cable television households in its market, and the typical non-commercial station was being denied access to *36%* of those households.[12]

Tom Meek, a broadcast and cable industry expert, studied the carriage experience of broadcast stations that began operating after mid-1985, when must-carry was no longer in effect. Meek reported that by mid-1992, new independent stations were not being carried on cable systems serving 52% of all cable television households in the stations' markets, and new public stations were not being carried on cable systems serving 71% of cable households. DAE VOL. IX, Third Meek Decl. ¶ 4, J.A. IV at 2054. These findings were consistent with testimony before Congress that stations entering the market after 1985 (*i.e.*, without the benefit of the must-carry rules) had met "a virtual stonewall of opposition from cable operators." JSCR ¶ 302, J.A. III at 1382.[13]

Meek also reanalyzed the FCC's 1988 survey results pertaining to "dropped" broadcast stations. Relying on carriage data that cable systems are required by law to submit every six months, Meek concluded that the FCC survey substantially *underestimated* the actual number of drops, and that carriage denials typically were either permanent or of long duration. *See* DAE VOL. II.A,

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DAE VOL. VIII, Noll Reb. Decl. ¶¶ 26-28, J.A. IV at 1801-02; DAE VOL. VIII, Exh. D, Schutz Reb. Decl. ¶¶ 39-47; NAB Mem. at 126-29.

[12] DAE VOL. VIII, Rohlfs Reb. Decl. ¶ 15, J.A. IV at 1874. Thus, appellants are simply mistaken in asserting that noncarriage figures say "nothing about whether a particular station was subject to noncarriage on any more than a single cable system among the 50 systems in the average local market." NCTA Br. at 19.

[13] Even new network affiliates were not being carried by cable systems serving 27% of cable households. *Id.*

Meek Decl. ¶¶ 25, 36, J.A. II at 625-26; DAE VOL. IX, Third Meek Decl. ¶ 15, J.A. IV at 2059. In fact, Meek did not even include a station in his noncarriage numbers unless the noncarriage lasted at least a year. *See* DAE VOL. II.A, Meek Decl. ¶ 36, J.A. II at 626.

These carriage figures—about which appellants, remarkably, say *nothing*—indisputably show that by 1992, "significant numbers" of local broadcast stations were not being carried by cable operators. Moreover, Congress was not just making "snap-shot" findings about a frozen historical past. It was making predictive judgments about the future. As we will now show, Congress had good reason to predict that noncarriage would increase without must-carry.

2. *Cable Had Increasing Power and Incentives to Deny Cable Carriage to Local Broadcast Stations.*

Congress' prediction that noncarriage would increase is amply supported by the record. Indeed, even the research relied on by appellants indicates that *the rate of noncarriage of local broadcast stations increased from approximately 11% in 1989 to between 19 and 31% by 1992* [14] —that is, noncarriage roughly doubled or even tripled between 1989 and 1992. And FCC Commissioner Quello warned Congress that the carriage problems "occurring today are just the 'tip of the iceberg'. These activities come at a time when the cable industry is just beginning to recognize the importance of local advertising." [15]

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[14] Appellants assert that a "Federal Trade Commission ("FTC") analysis of Defendants' pre-1992 data reveals that, on average, cable operators carried 8 out of 9 available broadcast stations" (TW Br. at 18 n.21). The figures relied on by appellants report the noncarriage rate *in 1989* as approximately 11%. *See* FTC Staff Reply Comments at 10.

[15] JSCR ¶ 523, J.A. III at 1515. *Accord* JSCR ¶¶ 524-533, J.A. III at 1515-18.

Congress knew that cable's bottleneck control was expanding dramatically. In 1985, only 37% of the television households had cable service. By 1992, the figure was "approximately 61%," [16] and was expected to reach 70% by the end of the decade. JSCR ¶¶ 9-11, J.A. III at 1253-54. At the same time, the industry was becoming increasingly concentrated. As of 1988, the ten largest multiple system operators ("MSOs") controlled access to 47% of all cable subscribers. JSCR ¶ 77, J.A. III at 1282. By 1994, the 10 largest MSOs controlled 63% of all cable systems,[17] and that figure is projected to reach 85% by the end of 1996.[18]

The recent acceleration in concentration is driven by the advantages of "clustering"—the desire to control as many cable systems as possible in a given television market area or "ADI." [19] By June 1993, in approximately half of all television markets, a single MSO controlled at least half of the cable television households.[20] A "widely respected" cable industry analyst, Paul Kagan Associates, Inc.,[21] explained that "accelerated MSO consolidation this year is all about 'clustering.' *Enhanced growth prospects*

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[16] JSCR ¶ 8 (1992 House Report; CR VOL. I.A, Exh. 4, CR 00410), J.A. III at 1253.

[17] Notice of Inquiry, *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, CS Docket No. 95-61, ¶ 79 (May 24, 1995), DAE VOL. IX at 11.

[18] DAE VOL. VII.D, Exh. 80 to 1 (memo from appellant Turner Broadcasting).

[19] An "ADI," or Area of Dominant Influence, is a geographically defined television market area. The average ADI includes approximately fifty cable systems.

[20] DAE VOL. II.A, Haring Decl. ¶ 45 (citing DAE VOL. VII, Exh. 213), J.A. III at 1107-08; *see, e.g.*, DAE VOL. VII.I, Exh. 210 at 3.

[21] *See* All Parties' Joint Statement of Undisputed Facts ¶ 109 (May 26, 1995); TW Br. at 23 n.28 (same).

for advertising sales is [the] driving force."[22] Clustering enables a single MSO to sell advertising that will reach most or all cable households in the local television market.[23]

The record before Congress demonstrated that cable's increasing ability to sell advertising provided a rapidly growing incentive to deny carriage to competing broadcasters.[24] The FCC reported that "[c]able operators' incentive to deny carriage" was "particularly great as against local broadcasters" because of competition for advertising revenue. JSCR ¶ 155, J.A. III at 1313. This conclusion is further supported by expert testimony and evidence from industry analysts and cable industry files.[25]

Appellants question Congress' assessment of these incentives by arguing that cable advertising revenue is substantially less than broadcast advertising revenue. But the relevant question is not whether broadcast advertising revenues exceed those of cable, but whether advertising revenues are important to cable. On that question, the record supporting Congress' judgment is overwhelming. Advertising revenue is widely viewed as "the cable industry's hottest and brightest area of growth," is a "top priority among operators," and will be "one of the key sources of incremental cash flow for the cable industry during the remainder of the decade."[26] Indeed, "[o]ver

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[22] Paul Kagan Associates, Inc., *Cable TV Advertising* at 1 (Sept. 30, 1994); DAE VOL. VII.K, Exh. 243, J.A. I at 301.

[23] DAE VOL. II.B, Noll Decl. ¶ 25, J.A. II at 1016; DAE VOL. II.A, Haring Decl. ¶ 44, J.A. III at 1106-07; NAB Mem. at 78-81.

[24] *See* JSCR ¶¶ 124-290, J.A. III at 1301-76.

[25] *See, e.g.*, JSCR ¶¶ 124-185, J.A. III at 1301-29; DAE VOL. II.B, Dertouzos Decl. ¶¶ 6-28, 32, J.A. II at 958-70, 972; DAE VOL. II.B, Noll Decl. ¶¶ 14, 24-27; DAE VOL. II.A, Haring Decl. ¶¶ 32-37; DAE VOL. IX, Dertouzos Reply Decl. ¶¶ 21-26; DAE VOL. VII.I, Exh. 200; DAE VOL. VII.K, Exh. 240 at 1.

[26] JSCR ¶¶ 34, 164, J.A. III at 1263, 1318; DAE VOL. VII.K, Exh. 246 at C 23980 (Paul Kagan Assocs., Inc. *Cable TV Advertising*, July 28, 1993), J.A. I at 251 (discussing cable operator's 40-60% profit margin on local advertising revenues); *accord* DAE VOL. VII.K, Exh. 235 (A&E Mem.) at 1, 2 (describing the "huge growth on the horizon" for spot advertising revenue); DAE VOL. VII.K, Exh. 244 at C 23905 (Paul Kagan Assocs., Inc., *Cable TV Advertising*, June 15, 1994), J.A. I at 284 (explaining that MSOs are embracing "the ad business with its juicy cash flow margins and zero impact on subscribers' bills"); DAE VOL. VII.K, Exh. 232 at 94 (Report by Grantchester Securities, et al.) ("Local advertising revenue is an exceptional incremental revenue opportunity for the cable television industry.").

50% of overall revenue growth from 1993 to 1994 can be attributed to local advertising volume," and "half (or even more) of income growth in the foreseeable future will come from the sales of local advertising."[27] Cable operators' local advertising revenues increased from $374 million in 1988, to $862 million by 1992, and to more than $1.2 billion by 1994.[28] This revenue source is projected to more than double again (to $2.9 billion) by the year 2000, and to increase to $4.4 billion by 2004.[29]

Appellants also point to significant carriage levels for the network affiliates, arguing that if operators were intent on capturing advertising revenue they would certainly deny carriage to network affiliates because they had the biggest advertising revenues. That argument is wrong for two reasons. First, cable operators face obvious risks of losing subscribers should they deny carriage to network affiliates, which they would not face should they deny carriage to smaller independent broadcasters.[30] Second, it

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[27] DAE VOL. II.B, Dertouzos Decl. ¶ 11, J.A. II at 962.

[28] DAE VOL. VII.K, Exh. 242 at 1 (Paul Kagan Assocs., *Cable TV Advertising*, Oct. 26, 1994), J.A. I at 308; see also JSCR ¶¶ 124-142, J.A. III at 1301-08; NAB Mem. at 32-37, 68-74.

[29] *Id.*

[30] DAE VOL. II.B, Noll Decl. ¶ 29 & nn.34, 35, J.A. II at 1018-19; DAE VOL. VIII, Exh. C, Noll Reb. Decl. ¶ 20, J.A. IV at 1798-99.

is precisely these smaller independents that provide cable's principal competition for local advertising.[31]

Vertical integration also provides an increasing incentive to deny carriage to broadcasters. The evidence on this issue before Congress was strong.[32] As Congress found (Act, § 2(a)(5)), and even the dissent acknowledged (J.S. App. 80a), vertical integration provides an incentive for operators to favor integrated cable programmers over local broadcasters.[33] This favoritism is confirmed by cable industry documents and other evidence.[34] MSOs were increasingly insisting on equity in exchange for carriage on their systems.[35] A major cable source concluded that vertical integration "is perhaps the most significant strategy executed by the cable industry over the last several years." [36]

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[31] DAE VOL. II.B, Noll Aff. ¶ 46, J.A. II at 1031-32; DAE VOL. II.B, Dertouzos Decl. ¶ 18, J.A. II at 965; DAE VOL. VIII, Exh. B, Meek Second Decl. ¶¶ 30-35. For several reasons (including lower cable carriage), independent stations have an audience reach—and advertising rates— that are more comparable to cable systems.

[32] JSCR ¶ 186 (TCI had equity in 22 cable programmers), J.A. III at 1329; JSCR ¶ 196, J.A. III at 1332.

[33] *See* DAE VOL. II.B, Noll Decl. ¶¶ 15-22, J.A. II at 1006-13; DAE VOL. II.B, Dertouzos Decl. ¶ 6(a), J.A. II at 959; DAE VOL. II.A, Haring Decl. ¶ 31, J.A. III at 1102-03.

[34] *See, e.g.*, DAE VOL. VII.H, Exh. 170 at 1749 ("All TCI systems must launch Starz [an integrated programmer] 2/94. Word from corporate: if you don't have free channels . . . Make one free."); DAE VOL. IX, Third Meek Decl. ¶ 44, J.A. IV at 2071-72 (percentage of TCI systems carrying Encore, owned by TCI, was 9 times that of other MSO's in 1991); DAE VOL. VII.K, Exh. 234 at 2.

[35] DAE VOL. VII.K, Exh. 254 at II-4 (TWS 0014 1829) (Time Warner memorandum); *see* NAB Mem. at 75 n.98 (citing additional sources). *See also* DAE VOL. VII.L, Exh. 280 at ¶¶ 167, 166 (Table 4.1) (FCC Report in CS Docket No. 94-48, Sept. 28, 1994).

[36] DAE VOL. VII.K, Exh. 254 at TWS 0014 1825 (56 vertically integrated programmers by 1994). The Congressional record also documented other incentives for noncarriage. These incentives included affiliation agreements with cable programmers that provided incentives to carry these programmers on a national basis, regardless of their popularity in a local community (JSCR ¶¶ 278-280, J.A. III at 1370-71); cable operators' desire to promote "cable products," which would lead to "an increased perception of value in cable by the subscriber" (JSCR ¶ 271, J.A. III at 1367); and direct revenue streams that pay-per-view, infomercials, and other cable programming offered. DAE VOL. II.B, Noll Decl. ¶¶ 18, 29, 33-34, J.A. II at 1009, 1018-19, 1022-23.

Thus, there was plainly sufficient evidence to support Congress' judgments that the incentives to deny carriage to significant numbers of broadcasters were real and growing.

B. There Was a Substantial Basis For Congress to Predict That Broadcast Stations Denied Carriage Would Be At "Serious Risk Of Financial Difficulty," Would "Deteriorate to a Substantial Degree," Or Would "Fail Altogether."

In many years of proceedings before Congress and the FCC, the cable industry never disputed that a broadcaster denied carriage on cable would suffer serious financial harm. Nor could they.

The record before Congress contained ample unrebutted evidence that the long term viability of broadcast stations is heavily dependent on their ability to gain cable carriage.[37] As a leading industry figure explained:

> Simply put, a television station's audience size directly translates into revenue—large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its

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[37] *See, e.g.*, JSCR ¶¶ 597-623, J.A. III at 1544-55.

> audience. Revenues will continue to decline, and the cycle will repeat.[38]

Empirical research "confirmed that station audience and station revenue are directly related in a near one-to-one relationship."[39] Thus, in a world in which the *noncable* audience was shrinking from 80% of television households in 1980 to 30% or less by the year 2000, JSCR ¶¶ 1-11, J.A. III at 1250-54, Congress had ample basis for concluding that broadcasters denied cable carriage would "deteriorate to a substantial degree." *See Turner I*, 114 S. Ct. at 2471.

Indeed, documents produced by the cable industry acknowledge

> the importance of cable television to broadcast television stations. Because viewership equates to ratings and in turn ratings equate to revenues, it is unlikely that broadcast stations could afford to be off the cable system's channel line-up for any extended period of time.

DAE Vol. VII.L, Exh. 284 at C0025434, J.A. V at 2117. A "Broadcast TV Study" prepared by a large MSO concluded that "with cable penetration now exceeding 70% in many markets, the ability of a broadcast television station to easily reach its audience through cable television *is crucial*." DAE Vol. II.A, Haring Decl., Att. B at 000224, J.A. V at 2143 (emphasis added). The study found that even in a market with only a 50% penetration rate, "[l]osing cable viewers would have a dramatic impact on station revenue." *Id.* at 000232, J.A. V at 2143. These market realities were recognized by the financial community. Stations without cable carriage encountered severe difficulties obtaining the financing needed for operations. This was established in the record before Congress, and was confirmed by the additional evidence.[40]

Both the record before Congress and the additional evidence demonstrate that denial of cable carriage adversely affects every aspect of a station's operations: its ability to provide news coverage; its ability to produce other programming, its ability to purchase programming; its hours of operation; and its staffing and equipment.[41] Congress was well aware of these facts.[42]

Appellants and the dissent below dismiss this evidence simply because "the intuitive obviousness of these results precludes the possibility that the Court remanded the case to us to discover them." J.S. App. 63a. But it is precisely because the adverse consequences of noncarriage

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[38] JSCR ¶ 704, J.A. IV at 1600.

[39] JSCR ¶¶ 596, 589-595, J.A. III at 1544.

[40] *See, e.g.*, JSCR ¶¶ 302-04, 581, 643-58, J.A. III at 1382-83, 1538-39, 1564-76; DAE VOL. II.A, Schutz Decl. ¶¶ 6, 15-16, 18, 43, J.A. II at 640-41, 644-46, 654; DAE VOL. II.B, Noll Aff. ¶¶ 36-42; DAE VOL. II.A, Haring Decl. ¶¶ 21-26, J.A. III at 1099-1102; DAE VOL. VII, Exh. B, Meek Second Decl. ¶ 11, J.A. IV at 1858; DAE VOL. II.B, Rohlfs Decl. ¶ 6, J.A. III at 1157-58; DAE VOL. III.A & III.B (affidavits from broadcast station owners); NAB Mem. at 58-60 & n.76. *See also* JSCR ¶¶ 535-711, J.A. III at 1520-1604; NAB Mem. at 54-66, 89-96; NAB Opp. at 61-79; NAB Reply at 33-35.

[41] JSCR ¶ 684, J.A. IV at 1588-89. *See* JSCR ¶¶ 684-711, J.A. IV at 1588-1604; DAE VOL. II.A, Schutz Decl. ¶¶ 6, 43, J.A. II at 640-41, 654; DAE VOL. II.B, Noll Aff. ¶¶ 36-42, J.A. II at 1024-29; DAE VOL. II.A, Haring Decl. ¶¶ 21-26, J.A. III at 1099-1102; DAE VOL. VIII, Exh. B, Meek Second Decl. ¶ 11, J.A. IV at 1858; DAE VOL. II.B, Dertouzos Decl. ¶ 30, J.A. II at 971-72; DAE VOL. III.A & III.B (individual station declarations); NAB Mem. at 63-65 & n.96; *Id.* at 92-94 & n.126.

[42] JSCR ¶ 711, J.A. IV at 1603-04 (1992 House Report at 51-52) ("The record also provides concrete and demonstrable evidence of the harm suffered by local broadcasters when they are not carried by, or are repositioned on, their local cable systems. Such harm has included reduced viewership, lost advertising revenues, and resulting forced reductions in local news, public affairs and other public interest programs, the inability of new stations to obtain financing to commence operations, and bankruptcy for existing stations.").

are both intuitively obvious and fully supported by the record that it was entirely reasonable for Congress to predict that stations denied carriage would suffer real and substantial harms—harms which jeopardized their ability to provide broadcast services to millions of noncable households.

C. Appellants' Departures From the Remand Instructions Provide No Basis For Overturning the District Court.

1. *The 1985-1992 Period Presents a Far Bleaker and More Complex Picture Than Appellants Contend.*

Faced with undisputed evidence that significant numbers of broadcasters were being denied carriage, appellants (and the dissent below) argue that such evidence cannot provide a reasonable basis for Congress' predictive judgments about the future because in the immediate past (1985-1992) broadcasting remained healthy despite the absence of a must-carry requirement. *See* NCTA Br. at 22; J.S. App. 51a.

This analysis asks the wrong question and, even then, provides an oversimplified answer. The issue is *not* whether broadcast television would collapse without must-carry. Rather, the issue is whether Congress reasonably concluded—based on the historical evidence, the conditions that existed in 1992, and rapidly developing trends —that must-carry was necessary to maintain the level of broadcasting available to noncable homes.

Appellants' historical analysis ignores important contrary evidence in the record before Congress. In 1990, the FCC told Congress that "generally the value of television stations has fallen; and in an almost unprecedented development, we now see cases of local television stations failing." [43] The FCC advised Congress that the "diversity in broadcast television services . . . *will be jeopardized* if

[43] FCC Report in MM Docket No. 89-600, at 80, ¶¶ 153-54 (released July 31, 1990); CR VOL. I.L, Exh. 23, CR 09052. *See also* JSCR ¶¶ 535-55, J.A. III at 1519-29; NAB Opp. at 71 n.76 (citing cable documents discussing declining condition of broadcast industry).

this situation continues unredressed." [44] Congress was certainly entitled to rely on this conclusion of an expert agency.

Furthermore, the record before Congress demonstrated that by 1992 the growth of broadcast stations had almost come to a halt; [45] previously granted construction permits were being forfeited and, as a result, the number of channel vacancies had already begun to rise; [46] financing for new stations and stations denied cable carriage was unavailable; [47] there was an unprecedented and growing number of station bankruptcies; [48] large segments of the

[44] *Id.* at 79 ¶ 149; CR VOL. I.L, Exh. 23, CR 09051 (emphasis added).

[45] *See* JSCR ¶¶ 577-584, J.A. III at 1537-40; DAE VOL. II.A, Meek Decl. ¶¶ 74-82, J.A. II at 626-31 (discussing declining growth rate); J.S. 112a, App. 2 (growth rate was 4.5% in 1986, but had dropped to 1.7% by 1992). By the early 1990s, analysts, including FCC Commissioner Quello, were predicting that some television markets could soon see a decline in the number of broadcast stations. JSCR ¶¶ 540, 564, 566, 584, 669, J.A. III at 1521-22, 1530-31, 1540, 1581. And because of the preparatory work a new station requires (licensing proceedings, station construction, etc.), the fact that there was even minimal growth in 1992 may simply have reflected decisions and financial commitments made years earlier. DAE VOL. V.C, Popham Dep. at 100, 256; DAE VOL. V.A, Goodman Dep. at 94-95.

[46] Between 1989 and 1991, the number of vacant UHF commercial channels *increased* by 41, and the proportion of vacant UHF channels increased from 16.6 to 20.8 percent. Federal Defendants' Statement in Response to the Court's Order of September 7, 1995 ("Fed. Stmt.") at 3-4. Contrary to the dissent's suggestion (J.S. 63a), barely a fifth of this increase in vacancies was attributable to new channel allotments. Fed. Stmt. at 3. *See also* JSCR ¶ 647, J.A. IV at 1568 (reporting a "dramatic increase in the number of unbuilt television broadcast construction permits being surrendered to the FCC"); JSCR ¶ 667, J.A. IV at 1580 (discussing forfeited permits).

[47] JSCR ¶¶ 643-658, J.A. III at 1564-76.

[48] *See* JSCR ¶ 659, J.A. III at 1576 (testimony by Commissioner Quello that 23 independent stations are in Chapter 11 and "[t]he

broadcasting market, including many stations in virtually all the smaller markets, were in precarious financial condition;[49] *real* advertising revenues were declining;[50] stations were discontinuing local programming and news operations or foregoing plans to provide such programming;[51] and stations were converting to inexpensive home shopping formats because, absent cable carriage, it was their only option for obtaining financing or staying on the air.[52]

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trend is growing"); DAE VOL. VII.N, Exh. 331 at N0005595 (NCTA Memorandum acknowledging that although NCTA had not found *any* independent station bankruptcies prior to October 1985, since that time, eight percent of independent stations had filed for bankruptcy). *See* JSCR ¶¶ 660-683, J.A. IV at 1576-88; NAB Mem. at 62-63 & n.84.

[49] *See, e.g.*, DAE VOL. VII.W, Exh. 2 (1992 NAB Television Financial Report at 1) (25% of broadcast stations in top ten markets experienced losses in 1991); *id.* (Table 14) (*median* stations in markets 31-150 showed pre-tax loss in 1991); DAE VOL. VII.W, Exh. 6569 (1992 NAB Financial Reports, Tables 11-16) (almost *fifty* percent of stations in most market sizes below the top 100 incurred losses); DAE VOL. VII.W, Exh. 669 (1992 NAB Television Financial Report, Table 64, Table 181) (*50 percent of independent stations nationwide lost money in 1990 and 1991, and 25 percent lost over $1.6 million*); JSCR ¶¶ 556-576, J.A. III at 1528-37; NAB Opp. at 71-74. The dissent dismisses these stark figures with the observation that independent stations had experienced even greater losses in 1986, J.S. 60a. But neither the dissent nor appellants explain why, given the size and persistence of these losses, it was "unreasonable" for Congress to conclude that these stations were in an economically precarious position.

[50] Time Warner's representation that broadcast advertising revenues "grew steadily" from 1985 through 1991 (TW Br. at 16) is based on dollars *unadjusted for inflation. Measured in real dollars,* broadcast advertising revenues *declined by 11%* from 1986-1991 (1986 was the first full year with no must-carry requirements in effect). *See* J.S. 111a, Appx. 1, Chart 2. The decline in broadcast advertising revenues over this period cannot be explained by general recessionary factors. J.S. App. 52a-53a. During the same period, advertising for all other industries (excluding broadcasting) showed a slight increase, and *advertising for cable more than doubled.* J.S. App. 111a, Appx. 1, Chart 2.

[51] *See e.g.*, JSCR ¶¶ 684-711, J.A. IV at 1588-1604.

[52] JSCR ¶¶ 672, 692, 706-08, J.A. IV at 1582, 1591-92, 1601-02.

Additionally, Judge Williams' own graph shows that by 1991 broadcast advertising revenues—the industry's lifeblood—had actually fallen back to their 1984 levels. J.S. App. 52A. Judge Williams also acknowledged that between 1988 and 1991 broadcast advertising revenues *declined* by $2.9 billion. *Id.* His attempts to explain that away as a consequence of general economic conditions in 1990 and 1991 are contradicted by the same graph, which shows cable's advertising revenue steadily *increased* during the same period. Most broadcast growth identified by Judge Williams occurred in the first year after the FCC must-carry rule was invalidated, and thus was likely predicated on investment decisions made while must-carry was still in effect. And cable operators in 1985 did not have anything like the bottleneck control they had achieved by 1992.

Finally, Congress had an additional reason to conclude that the 1985-1992 period understated the future risks to broadcasting. The record before Congress justified the conclusion that cable operators exercised self-restraint during this period for fear that adverse treatment of broadcasters would trigger new must-carry requirements. *See* JSCR ¶¶ 524-530; J.A. III at 1515-17. The remand evidence confirms that conclusion. In 1986, NCTA's President warned the 100 largest MSO's that cable operators would generate "political problems for ourselves" if they took steps that would injure broadcast stations, and urged self-restraint.[53] In 1986, Storer Communications warned its cable systems not "to be involved in a wholesale dislocation of broadcast signals *until such time as our legal position is clarified.*"[54] In 1988, Viacom's CEO directed that no broadcaster be dropped or repositioned without his prior approval "so that we do not become an example of demonstrated abuse and thereby the justifica-

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[53] DAE VOL. VII.N, Exh. 321; DAE VOL. VI.B, Mooney Dep. at 39-40.

[54] DAE VOL. VII.N, Exh. 345 at 1 (emphasis added). *See also* DAE VOL. VII.N, Exh. 343, 346, and 347.

tion for reregulation."[55] These warnings to exercise self-restraint were widely reported in industry publications.[56] None of this evidence was disputed. Not surprisingly, the Court below found "there was reason to believe that cable systems were on 'good behavior' while congress conducted its investigation as to whether must-carry rules were necessary." J.S. App. 12a.[57]

In light of all this evidence, Congress certainly acted reasonably in concluding that the problems encountered by broadcast stations between 1985 and 1992 were quite serious, would have been even more serious if the cable industry had not exercised self-restraint, and were likely to increase in the future.

2. *There Is No Merit to Appellants' Argument That Must-Carry Should Be Invalidated Because It Does Not Protect Significant Broadcasters.*

Unable to seriously dispute that "significant numbers" of broadcasters would be denied carriage absent must-carry, appellants (and the dissent) are forced to argue that preventing a significant reduction in the number of broadcast sources available to noncable homes is not a substantial or legitimate government interest. To support that argument, they argue that because most "mainstream" broadcast programming will be carried voluntarily, the additional "little-watched" programming protected by must-carry is simply not worth protecting. They also argue that this protected programming tends to be in large markets already served by other broadcasters, and is thus not needed to preserve mainstream broadcasting

[55] DAE VOL. VII.N, Exh. 344.

[56] *See* DAE VOL. VII.N, Exh. 323, 325, 326.

[57] Judge Williams acknowledged that evidence, but dismissed it because of his view that "collective-action" problems would preclude coordinated activity on this scale. J.S. App. 54a-55a. Appellants do not explain why it would be unreasonable for Congress to hold a different view, especially given the very high levels of horizontal consolidation in the industry, and the fact that the CEOs of the major MSOs, and the industry trade association, were vigorously advocating self-restraint.

in those markets. And they argue that must-carry rests on a limitless "more-is-better" rationale, and is for that reason an illegitimate effort to support individual broadcasters rather than the system of broadcasting.

Those arguments are irrelevant, and are foreclosed by the Court's prior decision in this case. The Court has already held that preserving the programming diversity achieved by the "system of allocation" is "a governmental interest of the highest order," and that "it has long been a tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner I*, 114 S. Ct. at 2470 (quotations omitted).

Moreover, stripped to its essence, appellants' argument amounts to a disagreement "with the responsible decision-maker concerning the . . . degree to which th[e government's] interests should be promoted." *Ward*, 491 U.S. at 800. As *Ward* squarely held, that is not a permissible basis for invalidating a content-neutral law under *O'Brien*. Congress decided that the millions of noncable households should continue to have access to more programming choices than the "mainstream" options appellants believe would suffice. That is the end of the matter.

Congress knew that many UHF independent stations would be dropped absent must-carry, and knew that many of these stations served relatively small audiences.[58] But Congress wanted to preserve the diversity these stations afford. In addition, if small stations survive, they can grow, or form new broadcast networks, further enriching the options for noncable households—as the emergence of the UPN network since enactment of must-carry demonstrates.[59]

[58] Indeed, Congress passed the All Channel Receiver Act, P.L. 87-529, in 1962 specifically to increase the potential audience for UHF stations. *See* 47 U.S.C. § 330 (empowering FCC to prohibit sale of non-UHF television receivers).

[59] Must-carry was "crucial" to the launch of the UPN Network because most of the stations comprising that network were UHF

In addition, the premises of appellants' "little watched" stations argument are seriously flawed.[60] The argument rests almost entirely on Nielsen diary reports that were designed to compare the large audiences attracted by network affiliates; the record before Congress indicated that this methodology did *not* accurately measure the viewership of small independent stations.[61] Appellants stipulated they would not take any position requiring a determination of the fairness or accuracy of Nielsen estimates,[62] and do not claim that Nielsen data accurately estimates the viewership of these independent stations.[63] Accordingly, there is *no* evidence in the record that this data is accurate, and because there was substantial evidence before Congress that it is not, the viewership data provides no basis for second-guessing Congress' judgment.

Even if appellants had shown that some must-carry stations had small audiences, that showing would not have been material. The argument suffers from an obvious uncertainty regarding cause and effect: the reason some broadcasters were "little watched" may well be because they had been denied carriage. Moreover, the broadcasters appellants describe as "little watched" generally receive higher ratings than the cable programming likely to replace them. Indeed, the Nielsen data indicates that stations carried pursuant to must-carry achieve higher ratings in cable households than all but a handful of

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independents, precisely those stations most likely to have been denied carriage absent must-carry. *See* DAE VOL. II.A, Exh. 3, Salhaney Aff. at ¶ 15, J.A. II at 637.

[60] *See* DAE VOL. VIII, Exh. B, Meek Second Decl. ¶¶ 1-18, J.A. IV at 1854-62; DAE VOL. IX, Exh. 2, Meek Third Decl. ¶¶ 35-36, J.A. IV at 2067-68; NAB Opp. at 53 n.51.

[61] JSCR ¶¶ 786-808, J.A. IV at 1646-58. *See also* DAE VOL. VIII, Exh. B, Meek Second Decl. at ¶ 4, J.A. IV at 1854-55; DAE VOL. IX, Exh. 2, Meek Third Decl. at ¶ 35-36, J.A. IV at 2066-68.

[62] DAE VOL. VIII, Exh. K at ¶ 1, J.A. I at 321. *See* NAB Opp. at 50-52.

[63] *See* DAE VOL. VIII, Exh. K at ¶ 1, J.A. I at 321; DAE VOL. VIII, Exh. H at 20, 22; NAB Opp. at 50-52.

cable programmers,[64] and appellants' expert acknowledged that most *cable* programmers have extremely low ratings.[65] Appellants obviously believe displaced *cable* programming is valuable, even if it has low ratings; indeed, a multiplicity of programming options is one of the principal benefits cable provides to cable households. Appellants thus seek to deny Congress the power to preserve for noncable households a small portion of the multiplicity of programming options available to cable households.

Appellants' "larger markets" argument is similarly off-target. One premise of the system of allocation is that larger markets can and should have the benefit of a larger number of broadcast sources. In a community with a population of 50,000, there may not be enough Spanish speaking residents to support the diversity of a Spanish language station. But large markets like New York City and Miami can support Spanish language broadcasters, just as other large markets like San Francisco can support a Chinese language station. In appellants' view, dropping a Spanish or Chinese language station in a market with 7 or 8 English language stations is unimportant. But maintaining those stations is certainly important to residents who speak only Spanish or Chinese, which is the point of the system of allocation. Indeed, these are "larger markets" precisely because many more people live in them, which means they are likely to include many more population groups with diverse interests and needs. And it is likely that these "larger markets" will also contain high concentrations of the generally less affluent citizens who do not have cable—the very persons must-carry is designed to protect. There is no reason why noncable homes in a large urban area should be denied the broadcast diversity their area can support merely because a sparsely

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[64] DAE VOL. VIII, Exh. B, Meek Second Decl. at ¶¶ 19-28, J.A. IV at 1862-65; DAE VOL. IX, Meek Third Decl. at ¶¶ 18-20, J.A. IV at 2060-61; JSCR ¶¶ 497-515, J.A. III at 1505-12.

[65] DAE VOL. IV.D, Exh. 7, McLaughlin Dep. at 252; *see also* DAE VOL. IV.A, Besen Dep. at 143-44; *accord id.* at 144, 146, 238-40 & 252; NAB Opp. at 58-59 & n.59.

populated rural area cannot support as many broadcasters.

The importance of maintaining present levels of diversity is not limited to preserving foreign language stations, although they vividly illustrate the point. Time Warner, for example, casually dismisses the cable carriage problems encountered by KNWS, a twenty-four hour broadcast news station in Houston, simply because there are eleven other broadcast stations in the Houston ADI. But for noncable households interested in 24-hour news, the disappearance of a community's only 24-hour news broadcaster is obviously not a trivial matter.[66]

Moreover, the evidence showed that noncarriage was a growing problem *throughout* the United States by 1992, not just in larger markets. By 1992 the *average* independent commercial broadcaster was being denied access to 47% of cable households and the *average* educational station was denied access to 36% of these households. *See* DAE VOL. VIII, Exh. L, Rohlfs Reb. Decl. ¶ 15, J.A. IV at 1874. Dr. Dertouzos reported that appellants' "own data [indicates] that in communities served by only four broadcast stations, *almost half* the local cable systems carried fewer than all four stations. The number of stations typically carried in markets receiving eight broadcast signals is little more than six."[67] Additionally, the principal study appellants (and the dissent below, J.S. App. 72a) rely on to support their argument that noncarriage

[66] KNWS is a new broadcast station—the only 24 hour per day all-news station in the Houston ADI—and it encountered significant resistance to carriage even *after* must-carry was enacted. "Price Cable Houston has decided to not add KNWS to its channel line-ups until after a Supreme Court decision that permits must-carry to survive." DAE VOL. III.A, Exh. 9, Johnson Decl. ¶ 10 (and Exhibit B thereto), J.A. II at 531. The real reason KNWS was denied carriage is reflected in a cable document that is one of many documents appellants insisted be filed under seal. *See* DAE VOL. VII.I, Exh. 198, J.A. I at 269; Response of NAB/INTV to Time Warner's Broadcast Station Rebuttal at 28-29.

[67] DAE VOL. IX, Dertouzos Reply Decl. ¶ 11, J.A. IV at 2016 (emphasis added).

occurs primarily in large markets *is not even a study of cable systems*: it is a study of only twenty-four "satellite master antenna television ('SMATV')" installations, and only for the period 1981 through 1985.[68]

Because the interests underlying must-carry are plainly substantial, appellants are ultimately forced to challenge the legitimacy of Congress' interest. Tracking the dissent, appellants contend that the interest in preserving a multiplicity of programming sources is illegitimate, on the ground that it amounts to unalloyed protectionism for particular broadcasters. *See* J.S. App. 71a; NCTA Br. at 34-35. That argument is simply wrong. To begin with, must-carry does not rest on a limitless "more-is-better" premise. Must-carry seeks only to *maintain* the multiplicity of broadcast programming sources available *within* the "system of allocation." That number is fixed by the FCC Table of Allotments. Far from seeking limitless expansion, Congress simply wanted to prevent cable from exercising its bottleneck power to substantially diminish the level of programming sources available pursuant to the system of allocation.

More fundamentally, Congress' desire to preserve a multiplicity of broadcast programming sources does not equate to simple protectionism for individual broadcasters. That argument confuses Congress' objective with the means by which that objective is achieved. Must-carry protects the interests of *viewers*, not broadcasters. When a cable operator refuses to carry a broadcaster, and instead carries a cable programmer, cable households face

[68] *See* FTC Staff Reply Comments at 7 (referencing the staff's 1986 SMATV analysis). The government "cited" this work (J.S. App. 72a), but only for the purpose of *criticizing* its dismissive treatment of noncarriage. Corrected Memorandum of the United States *et al.* in Opposition to Plaintiffs' Motions For Summary Judgment at 15 (June 21, 1995). *See* Comments of the NAB in MM Docket No. 85-349 (Apr. 25, 1986), CR VOL. 29, Exh. 170 at CR 16456-16459 (explaining these limitations). Moreover, the results are so dated, limited, and unrepresentative of carriage on cable systems, that they are meaningless for purposes of reviewing Congress' judgment.

no reduction in the number of programming options available to them. But noncable households are placed at risk by that action. The resulting adverse consequences to the excluded broadcaster—which can range from a diminution in the quality of news or entertainment programming to the demise of the broadcaster—fall directly on noncable homes served by that broadcaster, and are not offset in those homes by the addition of other programming.

Congress was not just responding to what the dissent described as a "general problem" of a new technology overtaking an old one, with resulting effects on particular competitors. *See* J.S. App. 43a. Accordingly, the familiar principle of antitrust law—that it protects competition, not competitors—is entirely inapposite. The critical difference is that here there are two distinct classes of citizens affected in very different ways by technological change: cable households (whose viewing options expand) and noncable households (whose viewing options contract). To the extent Congress sought to protect broadcast programmers, it did so not merely because of "unfair competition" from the increasingly dominant cable medium—although that justification is sufficient to sustain must-carry—but more fundamentally because *only* broadcast programmers serve noncable households. Even if a cable operator's decision to carry a cable programmer rather than a broadcaster could be said to promote aggregate consumer welfare or allocative efficiency, that result would be achieved at a substantial cost to the millions of (generally less affluent) citizens who depend on free over-the-air broadcast television. Must-carry protects those citizens in furtherance of the national policy of "fair . . . and equitable distribution" of broadcasting.

Furthermore, must-carry does not guarantee the survival of any broadcast station. Stations must still attract enough viewers to generate the advertising revenues on which they depend. But must-carry does provide an opportunity for diverse local programming to survive and flourish—an opportunity that would be extinguished if broadcasters are denied carriage on cable systems.

Just as the cable industry acknowledges that important values are served by affording diverse programming to cable households—regardless of a particular program's ratings—Congress had a substantial interest in maintaining a measure of programming diversity for noncable households. As demonstrated, must-carry directly advances that interest because without it significant numbers of broadcasters would be denied carriage on cable and would, as a result, suffer serious financial harm that would injure their ability to serve noncable households.

III. THE DISTRICT COURT CORRECTLY HELD THAT MUST-CARRY IS NARROWLY TAILORED BECAUSE ITS ACTUAL EFFECTS ON CABLE OPERATORS AND PROGRAMMERS ARE *DE MINIMIS* AND DIMINISHING, AND CONGRESS REASONABLY CHOSE MUST-CARRY RATHER THAN OTHER LESS EFFECTIVE REGULATORY OPTIONS.

The district court's analysis of must-carry's "fit" with Congress' objectives was plainly correct. *See* J.S. App. 18a-27a. Under *O'Brien*, a law burdens "substantially more speech than is necessary to further the government's legitimate interests" (*see Turner*, 114 S. Ct. at 2470), *only* when "a substantial portion of the burden on speech does not serve to advance" the government's interests. *Ward*, 491 U.S. at 799; *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 511 n.* (1991). A law is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689. *O'Brien* leaves the political branches of government with substantial latitude to choose among competing regulatory options, and reviewing courts should be "loath to second-guess the Government's judgment." *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989). Judicial disagreement with "the responsible decisionmaker concerning the most appropriate method" cannot be grounds for invalidation under *O'Brien*. *See Albertini*, 472 U.S. at 689; *Ward*,

491 U.S. at 800; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984).

A. Must-Carry Does Not Substantially Burden the Programming Choices of Cable Operators, Or the Nationwide Speech Opportunities of Cable Programmers.

Must-carry self-evidently has the *potential* to "reduce the number of channels over which cable operators exercise unfettered control" and to "render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Turner I*, 114 S. Ct. at 2456. But this *hypothetical* burden is not determinative. Rather, must-carry is to be evaluated on the basis of a practical assessment of its "actual effects"; *i.e.*, "the extent to which cable operators will, in fact, be *forced* to make changes in their current or anticipated program selections; the degree to which cable programmers will be *dropped* from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting *previously unused channel capacity* to the carriage of local broadcasters." 114 S. Ct. at 2472 (emphasis added).

In actual operation, must-carry occupies only a small fraction of cable's overall capacity, *much* less than appellants claimed in their first appeal to this Court. The "actual effect" of must-carry on cable programmers is likewise *de minimis*. And even this minimal burden is vanishing as cable channel capacity continues to increase.

1. *The "Actual Effects" On Cable Operators.*

Appellants previously claimed that must-carry commandeered "more than forty percent" of cable's channel capacity. NCTA Br. in *Turner I*, No. 93-44, at 7. Time Warner told the Court that "[o]n average, the 1992 Cable Act requires TWC to relinquish editorial and business control of an estimated 30% of its channels."[69] In fact,

[69] *See* Time Warner's Statement of Material Facts as to Which There is No Genuine Issue at ¶ 28 (Feb. 2, 1993) (J.A. in *Turner I*, No. 93-44, at 203). The dissent in *Turner* was expressly premised on the assumption that the Act deprives cable programmers "of access to over one-third of an entire medium." 114 S. Ct. at 2480 (O'Connor, J., dissenting).

Time Warner uses only 8.86% of its channel capacity for must-carry stations; industry-wide, only 7.19% of channel capacity is being used for must-carry stations.[70] Moreover, as the district court found, "cable operators have not been 'forced to make' substantial 'changes in their current or anticipated programming selections' as a result of the must-carry rules." J.S. App. 20a (quoting *Turner I*, 114 S. Ct. at 2472). Only 1.93% of Time Warner's channel capacity is being used for must-carry stations it had not voluntarily carried prior to 1992; the figure is even lower industry-wide—only 1.18% of channels are used for stations not previously carried.[71]

Even these modest figures greatly overstate the practical impact of must-carry. Most cable systems have been able to satisfy their must-carry obligations by using previously unused channel capacity. *See Turner I*, 114 S. Ct. at 2742. Appellants report that two-thirds of cable systems *claimed* they had "no available channels." TW Br. at 42 n.58. But the record before Congress, and the additional evidence, show that these claims substantially understate available capacity.[72] For example, although Time Warner claims that in 1992, 88% of its cable systems had "absolutely no extra channels" (TW Br. at 41 n.57); its own figures show that almost seventy percent of the time it added a must-carry station, it did not drop *any*

[70] DAE VOL. II.A, Shooshan Decl. at ¶ 11(c) & Exh. B, J.A. II at 689-90; NAB Reply, Att. A at ¶¶ 1-3, 8-12. The industry figures are derived from data provided by appellants' expert.

[71] DAE VOL. II.A, Shooshan Decl. at ¶ 11(c) & Exh. B, J.A. II at 689-90; NAB Reply, Att. A at ¶¶ 1-3, 8-12.

[72] JSCR ¶ 844-854, J.A. IV at 1675-80; *see, e.g.*, DAE VOL. VII.G, Exh. 156 (reporting that many cable systems "magically found channel capacity").

programming.[73] Similarly, *appellants'* expert's data show that, nationally, "cable operators have been able to satisfy their must-carry obligations 87% of the time by devoting previously unused channel capacity to the carriage of local broadcasting." J.S. App. 20a-21a (opinion of Judge Sporkin).[74]

Cable's own expert acknowledged that only 640 of the nation's 11,628 cable systems dropped even a single program, for any period of time, as a result of must-carry.[75] Nationwide, *cable operators were able to continue carrying approximately 99.8% of the programming they were previously carrying.*[76] Cable's expert offered *no* evidence on the degree to which cable operators had been forced to change "anticipated programming" because of must-carry. *See Turner I*, 114 S. Ct. at 2471. That is not surprising in light of the facts developed respecting appellants' particular claims. Time Warner, for example, only *alleged* that *13* of its 291 cable systems were unable to add particular programming because of must-carry.[77]

[73] *See* TW Br. at 41 n.56 (TW added 240 stations, but dropped programming on only 74 channels).

[74] *See* DAE VOL. II.A, Exh. 5, Shooshan Decl. at ¶ 14, J.A. III at 691-92.

[75] *Id.* at ¶ 15, J.A. III at 692. And appellants introduced no evidence concerning the duration of these drops. *Id.*

[76] *Id.* at ¶ 21, J.A. III at 694.

[77] Time Warner and the cable programmer appellants were required by discovery obligations and court order to identify each cable programmer denied carriage because of must-carry, DAE VOL. VII.B, Exh. 46, 48 and 50, DAE VOL. VII.A, Exh. 33 at ¶ 2 (court order), DAE VOL. VII.B, Exh. 60 (Time Warner response to court order), and to identify each instance in which they had *allegedly* been injured. *See, e.g.*, DAE VOLS. VII.A-B, Exhs. 34-36. A summary of Time Warner's injury allegations, filed as Def. Supp. Appx., Part C, shows only 13 cable systems where Time Warner alleged it would have added other programming but for must-carry. *See id.* at 10-11, 19-21, 41, 42, 70 and 74, J.A. IV at 1931; *see also* DAE VOL. VII.B, Exhs. 54, 56, 57, 60 and 61 (interrogatory responses).

These isolated and insubstantial burdens are insufficient to sustain a nationwide *facial* challenge.

The record shows that must-carry produced a substantial net *increase* in the total speech available to the public, with virtually no decrease in previously available speech. As even the dissent in *Turner* noted, Congress *could* constitutionally compel cable operators to make unused channels available for use by programmers the operators would otherwise not carry. 114 S. Ct. at 2480 (O'Connor, J., dissenting). In the vast majority of its applications, that is all must-carry does.

2. *The "Actual Effects" On Cable Programmers.*

Must-carry's effects on cable programmers are even more attenuated. Must-carry does not bar any cable programmer from access to any cable system. At most, it makes a marginal difference in the odds that a given programmer will obtain carriage on a given system. Moreover, unlike local broadcast stations, most cable programmers operate in a national marketplace, in which their programming is distributed through thousands of cable systems with, in the aggregate, hundreds of thousands of channels not occupied by must-carry stations.[78] And the fact that must-carry had such a minimal impact on cable operators' choices means that it did not materially affect the ability of cable programmers to obtain access.

After intensive efforts by the appellant programmers to determine the scope of their injury, none *alleged* injury on even *one percent* of the nation's cable systems because of

[78] DAE VOL. II.A, Exh. 5, Shooshan Decl. at ¶ 30, J.A. II at 697. In addition to these cable options, although appellants argue here that lack of carriage on a cable system forecloses a programmer's access to its audience, appellant NCTA told the FCC that "[p]rogrammers that are unable to gain carriage on cable systems have numerous alternative avenues to reach an audience . . . ." Comments of NCTA at 5, *Implementation of the Cable Act of 1992: Rate Regulation*, MM Docket No. 92-266 (filed May 15, 1996).

must-carry.[79] Even those allegations were greatly exaggerated.[80] For example, appellees analyzed the *alleged* effects of must-carry on 24 of the appellant cable programmers on Time Warner's 291 cable systems. Only four even alleged they were dropped from *any* of Time Warner's systems (and each alleged it was dropped on 1 or 2 systems).[81] Despite the programmers' general assertion of a "failure to launch" injury, Time Warner alleged that it denied carriage to only three of the 24 programmer appellants on *any* of its systems because of must-carry, and even these allegations involved only temporary or minimal asserted harms.[82] Indeed, the information produced by Time Warner demonstrated that, in most instances where programmers alleged harm because of must-carry, the Time Warner system either did not add any must-carry stations, did not itself allege that must-carry had caused it to take any particular action with respect to that programmer, added other cable programming instead of the programmer alleging harm, or replaced the programmer alleging harm with another similar cable programmer.[83]

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[79] DAE VOL. II.A, Exh. 5, Shooshan Decl. at ¶ 35; NAB Reply, Att. A ¶ 27.

[80] *See* NAB Mem., Appx. (addressing "Plaintiffs' Specific Injury Claims").

[81] *See* NAB Opp. at 100-104; Def. Supp. Appx., Part A (May 26, 1995).

[82] *See* Def. Supp. App., Pt. C at 74.

[83] *See* Def. Supp. App., Part A, J.A. IV at 1932. Other evidence demonstrated the speculative nature of the cable programmers' claims. Typically, cable programmers who claimed they could not gain carriage on particular systems because of must-carry had tried unsuccessfully to gain carriage on those same systems before must-carry. For example, in *every* instance that Court TV claimed it was not launched by a cable system, it admitted it "had attempted unsuccessfully to gain carriage on each of those systems before October of 1992," when must-carry was enacted. DAE VOL. VI.B, Exh. 15, Rose Dep. at 155-56; *see also* DAE VOL. VI.B, Exh. 10, Kerr Dep. at 142-43 (admitting that C-Span claimed injury from must-carry even if a cable operator told C-Span it "hated" C-Span or if an operator had 10 open channels and still refused to carry C-Span).

Nor is there any basis for the programmers' claim in *Turner I* that "[c]able program networks are finding it difficult or impossible to expand their audiences" and that launches on additional cable systems have "come to a 'virtual halt' due to must carry." Turner Br. at 16. In fact, most appellant programmers have millions more subscribers than they had in 1992.[84] Since 1992, appellant programmers have been added to cable systems far more often than they have been dropped, typically by ratios of at least twenty-to-one.[85] Furthermore, cable operators and programmers represented to the FCC that *rate regulation*, not must-carry, was the cause of their inability to expand even more rapidly.[86] And when rate regulation was eased in 1994, subscribership substantially increased.[87] Every economic measure—license fee revenues, advertising revenues, viewing share, and subscriber-

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[84] *See* NAB/INTV's Statement of Undisputed Facts ¶¶ 111-252 (providing figures for each cable network and citations to appellants' interrogatories from which this information was derived). Appellants have increased their subscribership by 30%, 100% and even 600%. *See* DAE II.A, Exh. 5, Shooshan Decl., Exh. L.

[85] DAE VOL. II.A, Exh. 5, Shooshan Decl. at ¶ 35 & Exh. H. For example, C-Span, which alleged it was dropped from 17 cable systems, was *added* to 947. *Id.*

[86] The industry told the FCC that because of rate regulation its incentives to add cable programming were "virtually non-existent," and reported that rate regulation had "all but force[d] a freeze of existing programming services." DAE VOL. VII.C, Exh. 73 at 3 (NCTA Comments in MM Docket No. 92-266); DAE VOL. VII.H, Exh. 171 at 8 (Comments of Court TV); DAE VOL. VII.C, Exh. 69 at 6 (Comments of C-Span) (FCC's rate reglation rules "do more than simply discourage the *addition* of the services; they actually provide an economic incentive for the C-Span services to be *dropped*").

[87] *See* DAE VOL. II.A, Exh. 5, Shooshan Decl. at ¶ 48 & Exh. J (Table 5).

ship—indicates that cable programmers have grown enormously since must-carry was enacted.[88]

The large and growing number of national cable programmers, cited by appellants as evidence that must-carry has constrained programmers, supports exactly the opposite conclusion.[89] Appellees' expert explained that "[i]t is quite evident that potential programmers and investors do not view this marketplace as significantly constrained, and in fact have reached the opposite conclusion." DAE VOL. II.A, Exh. 5, Shooshan Decl. at ¶ 55.

At most, appellant programmers argue that must-carry may have reduced their opportunity to compete for carriage on a few cable systems. However, they cannot cite any case in which this Court struck down an act of Congress under *O'Brien* on the basis of such speculative, modest, and isolated claims of harm.

3. *Even the Limited "Actual Effects" of Must-Carry Are Certain to Diminish As Channel Capacity Continues to Expand.*

The rapid expansion of cable's channel capacity is confirmed by the cable industry's repeated representations to Congress,[90] its internal documents;[91] numerous industry

[88] DAE VOL. II.A, Exh. 5, Shooshan Decl., Exh. M-R.

[89] From 1987 through 1992, the number of national cable programmers increased from 75 to 80. After must-carry, this number grew to 109 by 1994. (All Parties' Joint Statement of Undisputed Facts ¶ 137).

[90] The cable industry advised Congress that cable systems were aggresively being rebuilt by all the major MSO's and that cable viewers "soon will have a video menu of well over 100 options." JSCR ¶ 864, J.A. IV at 1683; *see also* JSCR ¶¶ 855-892, J.A. IV at 1680-96.

[91] *See, e.g.*, DAE VOL. VII.E, Exh. 100 at A004571-4574; DAE VOL. VII.D, Exh. 85; and DAE VOL. VII.H, Exh. 195 at C 00775.

surveys;[92] and expert analysis.[93] Paul Kagan Associates, Inc. projects that average cable channel capacity (which was 43 channels in 1994) will increase as follows: 1996: 59; 1997: 69; 1998: 80; 1999: 93; 2000: 111; 2001: 135; 2002: 157; 2003: 180. DAE VOL. II.A, Exh. 5, Shooshan Decl., Exh. T, J.A. II at 684.[94] By 1997, the typical system will have sixty percent more capacity than it had in 1994, *after* all must-carry obligations had been satisfied. Thus, every three weeks, cable's capacity expands by an amount sufficient to accommodate every broadcaster added as a result of must-carry. Every six months, cable's capacity expands by an amount sufficient to accommodate every broadcaster being carried pursuant to the must-carry provisions. This fact alone should defeat appellants' challenge.

Appellants nevertheless contend that because new cable programmers are rushing to enter the marketplace, channel capacity will always be constrained. This misses the point. Because there is no evidence that must-carry obligations will increase to any significant degree, the "burdens" entailed by must-carry will indisputably diminish as channel capacity increases.[95]

[92] *See, e.g.*, DAE VOL. VII.E, Exh. 91; DAE VOL. II.B, Exh. 8, Jackson Aff. at ¶ 10, J.A. III at 1118-19 (compiling DAE VOL. VII.G, Exh. 161) (summarizing Bortz & Company survey); DAE VOL. VII.D, Exh. 88 at A5244 (Beta Corporation study).

[93] DAE VOL. II.B, Exh. 8, Jackson Aff. at ¶ 10, J.A. III at 1118-19.

[94] Other industry sources confirm this explosive growth of channel capacity. *See* DAE VOL. VII.E, Exh. 91 at 145 & Table 5.2 (November 1994 survey reporting that sixty-five percent of cable operators surveyed intended to increase channel capacity—by an average of 27 channels—by the end of 1996); DAE VOL. II.B, Exh. 8, Jackson Aff. at ¶ 10, J.A. III at 1118 (study, commissioned by appellant Travel Channel, showing that almost all of the major MSOs planned to rebuild the majority of their systems to 750 MHZ [i.e., approximately 110 analog channels] before the year 2000).

[95] Appellants did not even attempt to prove that the new must-carry burdens they hypothesize would amount to more than a small

B. There Are No "Constitutionally Acceptable" Less Restrictive Alternatives That Advance Congress' Objectives Nearly As Effectively As Must-Carry.

"An incidental burden on speech is . . . permissible under *O'Brien*," if it "promotes a substantial government interest that would be achieved *less effectively* absent the regulation." *Albertini*, 472 U.S. at 689 (emphasis added); *accord Ward*, 491 U.S. at 801. This Court directed the district court to apply that standard on remand, 114 S. Ct. at 2469, and it did. *See* J.S. App. 22a.[96] None of the regulatory alternatives appellants have advanced—the A/B switch, leased access, the *Century Rules*, or subsidies—would advance Congress' interest in maintaining a multiplicity of diverse broadcast sources nearly as effectively as must-carry. Moreover, the doctrine of less restrictive alternatives is designed for situations where the means Congress chose will have a substantial impact on speech; it does not authorize judicial fine-tuning within a range of already *de minimis* burdens.[97]

The A/B Switch. Appellants' (and the dissent's) cavalier attitude toward Congress' judgments is illustrated by their discussion of the A/B switch. Based solely on anecdotal evidence involving a brief episode in a single city, as well as an intuitive assessment that the only problem with A/B switches is that they create an "occasional need to 'get up,'" the dissent concluded that A/B switches

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fraction of existing must-carry obligations, or would require even a tiny fraction of expanding capacity. *See* NAB Opp. at 112-13.

[96] Appellants deny that alternatives must be as effective as the means chosen by Congress. Yet NCTA made precisely this argument to the Court earlier this term. *See* Reply Brief for Petitioner NCTA in Nos. 94-1893, 94-1900, at 4 ("statute is narrowly tailored if the government interest would be achieved less effectively by means other than the congressionally chosen ones") (citations and internal quotations omitted).

[97] Because stations carried pursuant to the retransmission consent provision count against the cable operator's must-carry obligation, the Act is self-tailoring, and burdens no more speech than is necessary, as the modest "actual effects" of must-carry confirm.

would be preferable to must-carry. J.S. App. 106a. Congress, however, specifically studied the feasibility of the A/B switch, and rejected it as inadequate on the basis of indisputably "substantial" testimony and empirical analysis—including testimony from appellant NCTA that the A/B switch was technically and economically infeasible. *See* J.S. App. 24a (summarizing evidence). These studies uniformly showed that the A/B switch was not a practical alternative. In many instances new cable households removed unsightly roof antennas (often at the urging and assistance of cable operators), and A/B switches encountered substantial consumer resistance. Given this record, Congress is surely entitled to deference on this choice.

Leased Access. Congress understandably chose must-carry over an expanded leased access regime that would set aside an increased number of leased access channels for access by unaffiliated cable programmers and broadcast programmers alike. That alternative would not advance Congress' goals nearly as effectively as does must-carry, because some of the broadcast stations protected by must-carry would not be able to pay for leased access carriage, and because carrying additional *cable* programmers pursuant to an expanded leased access regime would do nothing to maintain broadcast diversity for noncable homes.

Moreover, leased access affects the power of cable operators to decide what programming to carry in precisely the same way as does must-carry.[98] It also prefers one class of speakers (unaffiliated programmers) over another (affiliated programmers), the only difference be-

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[98] The only difference is that under leased access, the operator would be compensated. But whether operators should be paid, and how much, is a question of economic policy, not of First Amendment principle.

ing that the classes of favored and disfavored speakers are differently defined.[99]

Thus, it is hardly surprising that appellants do not argue that leased access is a "constitutionally acceptable" less restrictive alternative to must-carry. Indeed, appellant NCTA is arguing to the FCC that leased access is unnecessary because *must-carry* is a less restrictive alternative,[100] Time Warner is currently arguing that any leased access regime violates the First Amendment.[101]

Furthermore, as a practical matter, Congress was amply justified in concluding that leased access would not achieve its "overriding" objective nearly as effectively as must-carry. Congress explicitly recognized that if a broadcast station were forced to use advertising revenues to pay cable systems for access to cable households, that would have precisely the adverse effect on broadcasting and on the forty percent of Americans who depend on *free* television Congress wanted to avoid. "Free" television, of course, is supported by advertising revenues. Congress explicitly determined that the power of cable operators to demand "payment" or "other consideration" to gain access to cable households was inimical to the interests it was pursuing.[102]

The dissent concluded that leased access was a preferable alternative only after rejecting those interests as illegitimate. Judge Williams preferred leased access solely on the ground that it was more narrowly tailored to preventing *anticompetitive* exclusions from cable systems, and would, in his view, achieve more economically efficient results than must-carry. J.S. App. 96a-103a. He did

[99] The Court has already ruled that speaker preferences of this nature do not trigger *any* need for heightened First Amendment scrutiny.

[100] *See* Comments of NCTA, FCC Docket No. 92-266, 96-60, at 5 (filed May 15, 1996).

[101] *See* Brief for Appellants, *Time Warner Entertainment Co. v. FCC* (D.C. Cir. 1995) (No. 93-5349), at 63-70.

[102] *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 51, CR VOL. I.A, Exh. 4, CR 00430.

not even attempt to analyze whether leased access was a more narrowly tailored and effective means of achieving Congress' principal goal of maintaining the level of broadcast sources available pursuant to the system of allocation. Plainly, leased access would not be as effective in achieving *that* goal.

The Century Rules. It is undisputed that the *Century Rules*—the limited must-carry rules issued by the FCC in 1987—would protect only 14 percent of the local broadcasters protected by the must-carry provisions of the Act.[103] That alone suffices to validate Congress' judgment. Furthermore, because the *Century Rules* imposed a minimum viewing threshold for must-carry status, they did not protect the broadcast stations most in need of protection. Indeed, appellant Turner Broadcasting Systems opposed their initial adoption by the FCC for precisely this reason.[104]

Subsidies. Providing direct subsidies is a simplistic alternative that raises far more questions than it answers. As a practical matter, a subsidy scheme risks entangling the government in content-based judgments. Unlike must-carry—which distinguishes between speakers based on technology, deciding which broadcast speakers to fund would require the government to use other criteria, and to establish an elaborate administrative mechanism to do so. If Congress determined that a broadcast station was not attracting enough viewers to be self-sufficient, Congress would have to decide whether to subsidize the station anyway, or to direct the station to make changes,

[103] In the district court, appellant Turner Broadcasting Systems argued that "86 percent of the must carry broadcast stations that were added under the Cable Act rules would not have been required to be added under the *Century* rules." Memorandum of Law in Support of Summary Judgment of Turner Broadcasting Systems, Inc. at 55 (May 26, 1995).

[104] Petition for Reconsideration filed by Turner Broadcasting Systems, Inc. in MM Docket No. 85-349 at 18 (Jan. 12, 1987); CR VOL. I.DD, Exh. 194, CR 17099 (describing the *Century* rules as "totally arbitrary" and "ludicrous").

including changes in programming. Must-carry does not present those problems.

Moreover, providing direct subsidies to broadcasters refused cable carriage would be inconsistent with an important government interest that is a cornerstone of federal communications policy—allowing competition in the marketplace to determine which broadcast stations survive. Competition in the broadcast marketplace ensures that stations are responsible to the needs of their viewers, and is essential to Congress' interest in a multiplicity of diverse broadcast sources. Must-carry furthers this pro-competitive policy by giving broadcasters a fair opportunity to compete for viewers. In contrast, direct subsidies violate this policy because they would artificially prop up broadcast stations that do not attract sufficient viewer or advertiser interest to survive.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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